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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

NO......

V. D. PAYNE,
Appellant

vs.

J. A. KIRCHWEHM

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

Facts, Statutory and Otherwise, Which Gave Rise to the Federal Questions

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An orderly exploration of the problem presented by respondent's motion to dismiss the appeal will be promoted by a concise statement, in the manner and form employed by this Court in *Adams v. Saenger*, 303 U. S. 59, respecting the federal questions which the appeal presents for the decision of this Court, and how they arose and developed in the Court below.

Plaintiff, a resident of Florida, brought this suit in Ohio, against a grantee of Florida real estate, to recover the mortgage debt which the deed, accepted by the grantee

and recorded, recited that the grantee assumed and agreed to pay. It was brought about 14½ years (less than 15 years) after the cause of action accrued, during all of which time defendant never was within the State of Florida.

The trial court sustained a demurrer which averred "that the action has not been brought within the time limit for the commencement of such actions", and gave judgment dismissing the cause. The Court of Appeals reversed the trial court, and the Supreme Court of Ohio, by a divided court, reversed the Court of Appeals and affirmed the judgment of the trial court.

The question presented by the demurrer, ordinarily an extremely simple one, becomes of federal importance because of the statutes of the two states involved, and because of the application and effect given them, or refused, by the Court below, and because of the extraordinary conclusion which that court reached.

Under the Ohio statute of limitations (Sec. 11221 G. C. Ohio), *as applied and given effect by the Supreme Court of Ohio to this specific cause of action,* the latter is not barred for 15 years (*Cleveland Trust Co. v. Elbrecht,* 137 Ohio S. 358).

Petitioner was satisfied, indeed he requested, that the Court below apply this Ohio statute of limitations. But the forum refused to do this, insisting that it was required to apply a lesser number of years if "the laws of any state or country where the action arose [Florida] limits the time for the commencement of the action to a less number of years", since Sec. 11234 G. C. Ohio provided that, in such event, "then said cause of action shall be barred in this State at the expiration of the said less number of years".

In anticipation of such a contingency, petitioner had set forth in his complaint the Florida statute of limitations

—Secs. 4663-(1) and 4648 Comp. Gen. Laws of Fla. and had also set forth the citations and purport of the decisions of the Supreme Court of Florida giving them effect and applying them *to this specific cause of action.*

These decisions hold that *this very cause of action* is not barred for 20 years under this Sec. 4663-(1) (*Brownson v. Hannah,* 93 Fla. 223; *Berns v. Harrison,* 100 Fla. 1105); and hold further that Sec. 4663-(1) must be read together with Sec. 4648, which provides that if the defendant "is out of the state the action may be commenced within the term *herein limited after his* [defendant's] *return to the* state" (*italics supplied*); and hold further that this applies as well to a defendant who never was within the state, and that no action is barred until the period fixed by the other sections has run after defendant's return to the state (*Van Deren v. Lory,* 87 Fla. 422).

The Complaint also averred defendant's absence from Florida during the entire period.

In spite of the Florida statute and decisions aforesaid, the Court below held that the instant action had become barred by the lapse of five years because another section, (Sec. 4663-(2), Gen. Comp. Laws of Fla.), fixed that period for the commencement of certain other actions; although the Supreme Court of Florida had held, in the aforesaid decisions, that this Sec. 4663-(2) *did not apply to the very cause of action involved in the instant case.*

As has been stated, the Court below claimed and insisted that it was required to apply and that it was applying, "the laws of" Florida in reaching that conclusion. It conceded that the Florida statutes were as above set forth; it conceded that the Florida decisions applying the statutes and giving them effect were as above set forth; but it refused to give these statutes the effect which they had in Florida, by Florida law and usage, as indicated

by these Florida decisions. Furthermore, the Court below held that it was not required to give any effect at all to the aforesaid Florida Sec. 4648, providing that "the action may be commenced *within the term herein limited after his* [defendant's] *return to the state*" (*italics supplied*), or to the Florida decisions applying this statute and giving it effect. Instead, the Court below held that defendant's absence from the State of Florida was immaterial in determining the time within which the action may be commenced, or be considered barred.

So we have the remarkable and anomalous conclusion, that a cause of action when sued upon in Ohio, is barred within five years, upon a presumed and pretended obligatory application by the forum of the Florida laws, although that very same cause of action is not barred under the laws of the forum for 15 years, and although the same cause of action is not barred under the laws of Florida for 20 years (if sued upon in Florida), and although, whatever the period, the action is not barred in Florida at all, under the laws of Florida, if defendant is never within the State of Florida, and although defendant never was within that State.

ARGUMENT

Respondent's Statement Opposing Jurisdiction does not challenge a single averment in appellant's Statement of Jurisdiction as to the nature of the case; nor does it deny that the federal questions we raise fall within this Court's obligatory appellate jurisdiction; nor does it claim that the federal questions we rely on are not available here because improperly, or untimely presented in the Court below. Indeed, respondent concedes that the federal questions were there properly and timely raised.

Respondent moves to dismiss the appeal merely "for the reason that the record fails to disclose the existence of any substantial federal question raised thereby". We respectfully submit that the decisions of this Court are clear that the federal questions presented by the appeal are "substantial", and well founded.

On Motion to Dismiss an Appeal the Federal Question Presented Is "Substantial" When It Is Not Frivolous

On motion to dismiss an appeal "the issue is not whether the federal question relied on will be found upon examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous" (*Louisville and Nashville Railway Co. v. Melton*, 218 U. S. 36, 49; *Green v. Van Bushkirk*, 5 Wall. 307; *Crapo v. Kelly*, 16 Wall. 610).

A motion to dismiss an appeal can prevail only if the

claim of a federal question is "unsubstantial or frivolous" (*Andrews v. Andrews,* 188 U. S. 14); "if it plainly appear that the federal question is so unsubstantial and devoid of merit as to be frivolous" (*Deming v. Carlisle Packing Co.,* 226 U. S. 102; *Dickson v. Luck Land Co.,* 242 U. S. 371); if it is "manifestly frivolous" (*West Side Belt Railroad Co. v. Pittsburgh Construction Co.,* 219 U. S. 92); or if it is "wholly frivolous" (*Chicago R. I. Pac. Ry. Co. v. Devine,* 239 U. S. 52, 54).

It is sufficient to withstand a motion to dismiss an appeal if the claim of a federal question is not "wholly without foundation", if there "be at least color of ground for such averment" (*Hamblin v. Western Land Co.,* 147 U. S. 531); if it "is at least plausible upon its face" (*American Sugar Refining Co. v. Louisiana,* 179 U. S. 89, 91); and "unless manifestly frivolous" the motion to dismiss must be denied (*West Side Belt Railroad Co. v. Pittsburgh Construction Co., supra; American Sugar Refining Co. v. Louisiana, supra*).

"A federal question which requires analysis and exposition for its decision is not frivolous and withstands a motion to dismiss" (*Milheimer v. Moffet Terminal Improvement Dist.,* 262 U. S. 710).

In *Louisville & Nashville Ry. Co. v. Melton, supra,* this Court said (at p. 49):

> "For the purpose of the motion to dismiss the issue is not whether the federal question relied on will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject and hence cause the question to be frivolous. That this is not the case here, we think results from the following considerations:

(*a*) because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented;

(*b*) Because the division in opinion in the lower court as to whether the statute, as construed, was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy over the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below."

We respectfully submit that the latter decision alone is conclusive that the instant motion to dismiss should be denied, since the case at bar presents every factor there involved. Here, too, there was considerable conflict in the different courts below and a division in the opinion of the Court below, and Justice Bell, in his dissenting opinion, stated very positively that the conclusion of the majority was "in head-on collision" with the Federal Constitution.

Appellant's Claims That Federal Questions Are Involved Is Well Founded as Well as Substantial

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We respectfully submit that the decisions of this Court are conclusive that the present issues not only present federal questions, but that they are each of them substantial.

Obviously, the issue presented in this suit in Ohio by appellee's demurrer involved the statutes and laws of Florida. The judgment below sustaining the demurrer and dismissing plaintiff's action rested on these Florida statutes and laws. Obviously, while presuming to apply

the Florida statutes and laws and while claiming that it was required and obligated to do so by the mandate of its own legislature, the Court below concededly did not give to these Florida statutes and laws the effect which by law and usage they had in Florida.

This Court has held in numerous instances that the claim that the forum decided against the effect which appellant claimed the statutes of a sister state had by law and usage in the state of their enactment "clearly presents a substantial question under the full faith and credit clause of the Constitution" (*Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389; *Adams v. Saenger, supra; Crapo v. Kelly, supra; Green v. Van Bushkirk, supra*).

Similarly, appellant's claim that the Due Process clause of the Federal Constitution was violated by the decision below, is supported by this Court's ruling in *Home Insurance Co. v. Dick*, 281 U. S. 397, 407, that "the objection that, as applied to contracts made and to be performed outside [of the forum] the statute violates the Federal Constitution, raises federal questions of substance [under the Due Process clause], and the existence of the federal claim is not disproved by saying that the statute or the one year provision in the policy, relates to the remedy and not to the substance".

We frankly admit that appellant's claim that the decision below impaired the obligation of plaintiff's contract, presents a debatable question, since we can point to no decision in this Court which has determined it in our favor. But the same proposition, founded on identical facts, was also presented to this Court in an analogous situation, in *Home Insurance Co. v. Dick, supra*, and was not there rejected. This Court there merely stated that it was not required to dispose of that question since the judgment was in any event being reversed for other reasons

(see p. 411 of that case). We suggest that even this is indicative of an honest and serious proposition, sufficient to withstand a motion to dismiss.

The Motion to Dismiss the Appeal Must Be Considered in the Light of All the Facts and of All the Florida Statutes as a Whole and Not Distributively

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Respondent, in arguing his motion to dismiss, treats Florida's Sec. 4663-(1) as involving a separate and distinct proposition and Florida's Sec. 4648 as involving another separate and distinct proposition. Instead of quoting the latter section, he gives a supposed summary thereof and omits therefrom the internal reference, evidenced by the phrase "term *herein* limited", to the other sections of the statute, fixing 20 years (or any other number of years) within which the action may be commenced. He ignores the decision of the Supreme Court of Florida (*Van Deren v Lory, supra*) holding that these two sections must be read together and that, as a result, the action is not barred until the specified number of years have run from the time of defendant's return to Florida.

Having thus emasculated the statute, and having eliminated therefrom the connection of Sec. 4663-(1) and having ignored the Florida decision aforesaid, respondent argues that the forum is not required to give faith or credit to this statute of another state (Sec. 4648).

We respectfully submit that the forum may not divide into two what is in reality a single statute and, viewing the two parts of the statute distributively, and ignoring one of them, give to the other an application and effect different from that given to it by the state of its enactment;

to do so violates the Full Faith and Credit clause of the Federal Constitution.

We respectfully submit that "part of a fact or contract is not the truth" (*Eaton's Appeal*, 66 Pa. 483, 490); neither is part of the law either the truth or the law. We submit that for the forum to apply one part of a statute and to reject another part thereof is to give not "full" but only "some" credit to that statute and violates the pronouncement of this Court that what the Full Faith and Credit clause of the Constitution requires is that the forum shall give "not some but full faith and credit" (*Davis v. Davis*, 305 U. S. 32, 40.

In *Messersmith v. American Fidelity Co.*, 232 N. Y. 161, 166, Justice Cardozo said:

> "The character of a liability is not to be determined by analyzing the constituent acts which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole."

Respondent concedes that "in quite a number of states [which under their statutes are required to apply the statute of limitations of the state where the cause of action arose] the rule is different and their courts construe their borrowing statute to borrow not only the limitation statute of the foreign state, if shorter, but also their tolling statute". We appreciate the concession, but it is very much of an understatement. The fact is that the states are *unanimous* in that conclusion and that Ohio stands alone in its division of the two.

American Jurisprudence, Volume II, Sec. 197, page 514, discussing this very question states the principle to be:

> "All of the foregoing principles are subject to the indispensable preliminary factor that a statute

admitting the bar of another state should not be held to supply a defense if in fact the courts of such other state have not been in a position to afford relief."

We respectfully submit that to hold otherwise than as above quoted, would not only be a violation of the Full Faith and Credit clause of the Constitution, but would constitute a denial of Due Process under the Fourteenth Amendment.

Appellant Is Not Foreclosed as to Whether the Federal Questions Here Involved Are "Substantial"

Nor may it be held, as respondent argues, that the memorandum of this Court, dismissing the appeal in *Alropa v. Kirchwehm*, 313 U. S. 549, which memorandum recites no facts, forecloses the present appellant on the question whether the federal questions here presented are "substantial", since respondent specifically concedes that a number of facts, statutory and otherwise, are here present, which did not there exist: such as defendant's absence from the State of Florida, the application of Florida's Sec. 4648 to that fact, the division of opinion in the Court below, and a dissenting opinion specifically challenging the conclusion of the Supreme Court of Ohio as being "in head-on collision" with the Federal Constitution; all of which were absent in the Alropa case.

Respondent does not use the term *stare decisis*, but obviously he has that doctrine in mind as the basis of his argument. But this Court has ruled time and again that this doctrine does not apply under the present circumstances: "The general language of the opinion must be read *in connection with the facts*" (*Italics supplied*); "General language must be confined to the precise state of facts

with reference to which it was used" (*U. S. v. Eaton*, 169 U. S. 331, 348; *White v. Aronson*, 302 U. S. 16, 21; *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 381).

We respectfully submit that not only is the memorandum in the Alropa case bare of any recital of facts, but that the radical difference in the facts as above recited, makes it impossible in law to consider the Alropa memorandum as *stare decisis* on the issue in the present case: whether the federal questions involved are substantial.

Moreover, it will be remembered that the respondent concedes that the federal questions involved in the Alropa case were not properly presented in the Court below. In view of that fact, we respectfully suggest that all that this Court decided by the dismissal of the appeal in the Alropa case was that the question was not "properly presented" and was not "substantial" for the reason which this Court gave in *Dickson v. Luck Land Co., supra*, that a question is frivolous where it was "not in any way brought to the attention of the court below".

Other Observations of Respondent Which Are Erroneous

Respondent argues that the conclusion of the Court below was "for procedural purposes" and therefore presumably involves no federal question. The court will look in vain in the record for any procedural question upon which the parties differed, and defendant's demurrer, to which we have referred, does not suggest any. If by "procedural question" respondent refers to Ohio's Statute of Limitations, then we beg to reiterate that plaintiff requested the Court below to apply its own statute of limitations and that it refused to do so. When it undertook to apply the statute of limitations of Florida (or any statute

of a sister state for whatever reason) the Full Faith and Credit clause of the Constitution came into play and the Court was required to give such credit to that statute. This the Court below did not do.

Again, respondent argues that what the Court below did was to determine the character of defendant's obligation as it was under the law of the forum. That is not a correct statement of the effect of the decision. We took considerable pains in our Statement of Jurisdiction to show that the nature and character of defendant's obligation is exactly the same in Ohio as in Florida, and cited and quoted decisions of each State, showing that the nature of the obligation was, in fact and in law, as similar in the two states as two peas in a pod, even as to the terminology and expressions employed.

Respondent suggests that the decision below turned upon the forum's construction of a Florida statute and involves no federal question. This, also, we deny. There was no room here for statutory construction. The highest court of the State of Florida had already spoken on the subject and this left no room for doubt as to the construction, application and effect of the statute. What the Court below did was to refuse to give to the Florida statute that application and effect which Florida gave it by its law and usage and by its decisions. That is a federal question.

Appellee intimates that the decision of the Ohio court was merely a "mistaken application of the doctrine of Conflict of Laws". We beg to reiterate that we requested the forum to apply its own statute of limitations of 15 years and that it refused to do so, and we submit in answer to appellee's suggestion that where the forum *refuses to apply its own law*, considers itself compelled (by its own statute) to apply the law of a sister state, and while purporting to do so adopts a conclusion which is neither the

law of the forum nor that of the sister state, a question of full faith and credit is squarely presented.

We respectfully submit that the federal questions we present are each of them substantial, especially in the sense used by this Court; that they certainly are not frivolous; and that, since it is conceded by respondent that they were properly and timely raised in the Court below, that the motion to dismiss the appeal should be denied.

Respectfully submitted,
SIGMUND H. STEINBERG,
WILLIAM K. GARDNER,
Attorneys for Appellant.